United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

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P/S

75-7101

United States Court of Appeals
FOR THE SECOND CIRCUIT

SALEM INN, INC. and M & L REST, INC.,

Plaintiffs-Appellees,

against

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

KASSNER & DETSKY
Attorneys for Appellees
122 East 42nd Street
New York, New York 10017
212—661-8190

Of Counsel:

HERBERT S. KASSNER

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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On Appeal from the United States District Court for the Eastern District of New York

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BRIEF FOR APPELLEES

THE ORDINANCE

The ordinance does not, as appellants claim, prohibit "topless dancing." It prohibits the appearance of any person with breasts or pubic hair or genitals in designated places which may or may not serve food or drink, may or may not offer entertainment, may or may not sell alcoholic beverages, and may or may not permit singing or dancing on the premises by patrons. The ordinance makes no distinction between performance of the proscribed act by waitresses and patrons and such performance as part of an artistic exhibition

protected by the First Amendment. No obscenity criteria are imposed.

There is no public exhibition which is not engulfed by the ordinance. It covers a ballet, musical, legitimate show with or without dancing, aquatic display, swimming race, weight lifting contest, belly dance, modern dance, go-go dance, etc. It ensnares bikini wearers and plunging neckline wearers. It paints the Ballet Afrikan, musicals such as "Hair", topless go-go dancers and nude sunbathers with the same brush. It makes the proprietor of the designated places legally responsible for the attire of his patrons.

The ordinance serves no legitimate or compelling state interest, since its alleged benefits could be achieved through enforcement of existing laws.

It does not, as appellants claim, merely prohibit "topless dancing." It would take dozens of state cases and years to limit its radiant scope. In the meanwhile, expression protected or presumptively protected by the First Amendment would be chilled and suppressed in the ephemeral cause of modesty, under the guise of morality and in the service of hypocrisy.

Secondly it sets up capricious, discriminatory place classifications in violation of the Equal Protection Clause of the 14th Amendment.

THE FACTS

Appellees are the owners and operators of bars in the Town of North Hempstead, Nassau County, State of New York, which provide and have for years provided, live topless dancing entertainment by professional dancers who perform on a stage in a decorous manner for the entertainment of forwarned consenting patrons (A-15,16,18).

On July 24, 1974, the Town of North Hempstead adopted Chapter II of its Code (Hereinafter referred to as the "Ordinance") which made unlawful the appearance of any person with uncovered breasts or pubic hair or genitals in designated places and in addition, made unlawful the proscribed activity whether or not as part of entertainment in all such places. Appellants concede that within the scope of activities prohibited by the Law was the type of dancing entertainment provided in appellees' establishments. Because the ordinance made the entertainment offered by appellees unlawful, because of the arrest of a neighboring bar operator's employees on the day the Ordinance became effective, and because of their fear of prosecution should they violate the ordinance, appellees ceased on the date that the ordinance became effective, to provide topless dancing entertainment for their patrons. This cessation caused appellees to sustain immediate severe economic loss, threatened them

with insolvency and their employees with unemployment and deprived their patrons of the right to view the topless dance performances theretofore offered at the premises (A-15,17,18,31,32).

Faced with the likelihood of going out of business, appellees filed an action under the Civil Rights Laws to declare the ordinance unconstitutionally overbroad and a denial of equal protection in violation of the First and Fourteenth Amendments and sought a permanent injunction against its enforcement. At the same time they applied, in vain, for the issuance of a temporary restraining order.

POINT I

THE ORDINANCE IS UNCONSTITUTIONAL

The Ordinance is Overbroad

Whether topless dancing is proscribable by a narrowly drawn ordinance directed at the alleged evil sought to be proscribed is not the issue herein.[1] What is the issue is whether the ordinance, on its face, regardless of its drafter's intention, is overbroad, i.e., "patently capable of many unconstitutional applications, threatening those who validly

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[1] It appears undeniable that, however an offense be characterized under local law, obscenity requirements must be satisfied when the law proscribes expression by reason of its sexual orientation. Miller v. California, 413 U.S. 15, Paris Adult Theatre v. Slaton, 413 U.S. 49.

exercise their rights of free expression with the expense and inconvenience of criminal prosecution, Thornhill v. State of Alabama, 310 U.S. 88, 97-98. Cf. Staub v. City of Baxley, 455 U.S. 313"; Smith v. California, 361 U.S. 147, 151.

Neither Legitimate Nor Compelling Governmental Interest May Be Fostered By Means of Overbroad Speech Inhibiting Legislation.

Appellants argued below (While curiously refraining from mentioning in their brief) that the legitimate and compelling interests of the Town of North Hempstead to abate the alleged nuisances of litter, noise, patron's conduct (unspecified), congestion, and proximity to schools required the enactment of the Ordinance. They have consistently failed to acknowledge that specific legislation directed against each and all of the foregoing "nuisances" has already been enacted in the laws of the State of New York, County of Nassau, and Town of North Hempstead. Judge Bartel in his decision below addressed himself to this nuisance argument and stated,

> "The challenged ordinance plainly covers a field much wider than is essential to further the Town's interest in dealing with the nuisance conditions complained of at the public hearing. Instead of dealing with the specific conditions, the ordinance focuses on an activity which can contain protected expression and which has not been shown to be the source of the problem. Similar problems of crowds, noise and litter are frequently presented by many forms of public entertainment such as sporting events, rock concerts, political rallies, etc., and it would be equally

> unreasonable to ban such events in order to correct problems which can be best attacked through regulation of zoning, parking, hours of operation, etc." Salem Inn, Inc. v. Frank, U.S.D.C., Eastern District of New York-74 C-1108, September 10, 1974.

Appellants' claim amounts to the argument that the ordinance undercuts the nuisance at its source. This may be efficient yet impermissible. Appellants may not burn down the house to roast the pig. They may not outlaw prayer because of the noise and traffic congestion incident to Sabbath observance adjacent to Houses of Worship. They may not outlaw the publication of newspapers because of the noise of the presses and the congestion occasioned by the mass meeting. They may not outlaw shows by reason of the conditions necessarily occasioned by wide-spread public acceptance and attendance. This, however, is just what appellants claim they may do. Problems of where the public should be permitted to congregate are readily resolvable through zoning legislation. Problems of littering and noise are readily resolvable through specific penal legislation addressed to such subjects. Problems of traffic congestion are readily handled through traffic regulations. None of the foregoing problems are required or permitted to be resolved through the process which appellants elect to adopt, undercutting at the source.

Overbreadth Adjudication Is Available Whenever A Law Is Susceptible Of Speech Inhibiting Application, As in The Ordinance

Appellants argue that an overbreadth adjudication is unavailable to Appellee, citing Broadrick v. Oklahoma, 413 U.S. 601 (1973).

It is uncontested that the dancers who perform in plaintiff's premises are employed solely as dancers and perform no other function other than dancing on stages for the entertainment of the patrons. It cannot be denied that this dancing constitutes a theatrical performance or production protected by the First Amendment. Southeastern Promotions Ltd. v. Conrad, U.S. (March 18, 1975) 43 LW 4365; Schacht v. U.S. 398 U.S. 58 (1970); California v. La Rue, 409 U.S. 109, at 118 (1972); PBIC, Inc. v. Byrne, 313 F. Supp. 757 (U.S.D.C. Mass. 1970-Three Judge Court) vacated on other grounds, 401 U.S. 987 and judgment vacated for reconsideration in light of Miller, et al., 413 U.S. 905 (1973) People v. Wendling, 258 N.Y. 451.[2]

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[2] This subject is more fully treated in Point II hereof. As Judge Oaks noted, in footnote 3 of the majority opinion in Salem Inn v. Frank, 501 F. 2d 18

> "While the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by Judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some entertainment with his beer or shot of rye."

Notwithstanding the foregoing appellants treat the dancing in appellee's premises as if it were not within the ambit of First Amendment protection and therefore, not subject to overbreadth adjudication. They reason as they did in the first Salem Inn case, that because a "municipality must deal with most basic elements of day to day living ... (and) must provide for garbage removal, repair of street and roads, and the enforcement of its zoning law ... (and) it is critical to the municipality that such concerns be examined in relation to its day to day responsibilities and needs ... it was proper to exclude topless dancing by prohibition of nudity in bars, cabarets ... or any other public place ... (and) the method exercised by the legislative body to ensure the health, safety and well-being of the communi , is not a proper subject for review by this Court."[3]

If the responsibility for these local government functions can somehow be translated into the power to censor, inhibit and suppress expression, where is speech immune from censorship, prior restraint and criminal sanction, and where is the fundamental exercise of First Amendment rights sacrosanct?

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[3] Appellants U.S. Supreme Court Brief, pages 11 and 12

Appellants argue that they did not bar dancing or entertainment nor did they close the doors of appellee's businesses. No, they did not do that, they merely censored in advance the performances which could be exhibited in those premises as well as in most other public places within the Town.[4]

If The Ordinance Were Not Aimed at Diminishing Or Closing Appellees' Business, It Would Have No Relation At All To Its Purported Purposes

The evils of litter, noise and congestion sought to be remedied by the ordinance are evils incident to any public assemblage. If the ordinance were not meant to put the plaintiffs out of business or to substantially reduce appellee's patronage, those evils would remain uneffected by the Ordinance. As to the alleged evil of proximity to schools where young children are in attendance, there is no evidence in the record that the exhibition in plaintiff's premises could be viewed by such children nor does the board prohibition allow such exhibitions in places which are not in close proximity to schools.[5]

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[4] See the prior restraint discussion relating to Southeastern Promotions, Ltd. v. Conrad in Point III hereof.

[5] In fact, the complaint alleges, "only adults are permitted to enter bars," and this allegation is not contested other than by appellants' denial of sufficient knowledge or information to form a belief. In any event, under New York Penal Law Section 235.21, it is a crime to expose indecent material to minors, and the definition of indecent materials includes nudity which under Section 235.20 includes substantially the same definition of an uncovered female breast as is set forth in the Ordinance.

Thus, it is apparent that the Ordinance in question far from being required by any compelling governmental interest of the Town, cannot even be considered aimed at the evils which appellants claim it seeks to prohibit.[6]

The Sweep Of The Ordinance Is Far Greater Than Necessary To Accomplish The Desired Governmental Ends

Appellants cannot deny that were the sweep of the ordinance greater than necessary to achieve the legitimate end sought thereby, the ordinance would be overbroad and unconstitutional.[7] Even if the foregoing were true, the ordinance is fatally overbroad.

It cannot be doubted that the State of New York, County of Nassau and Town of North Hempstead have sufficient laws already enacted to cope with the problems of litter, noise, or congestion adjacent to any public place. If these laws are not sufficient, additional legislation directed at the evils rather than the source can be enacted. Similarly,

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[6] To the extent that the Ordinance could destroy appellees' businesses it could be effective by removing the source of the alleged evils.

[7] Appellants have here substituted "legitimate ends" for "compelling interests." Were this not an ordinance effecting dissemination of expression presumptively protected by the First Amendment, they would be correct.

the Town's right to enact zoning legislation forbidding certain types of establishments to exist in certain areas or in proximity to certain types of buildings such as schools or churches, is not disputed. How then can appellants allege that the sweep of the ordinance, admittedly enacted to eliminate the source of the foregoing alleged nuisances, is no greater than necessary to achieve such ends? It could reasonably be argued that even if the ordinance were not susceptible of sweeping and improper application with respect to the suppression of First Amendment rights it would still be violative of rights under the Fourteenth Amendment to operate a lawful business in a lawful manner. See: Terrance v. Thompson, 263 U.S. 197; New State Ice Co. v. Liebmann, 285 U.S. 262; Truax v. Riach, 239 U.S. 33; Allgeyer v. Louisiana, 165 U.S. 578.

We are not however, concerned with local regulation of ordinary economic activity. We are here concerned with an ordinance aimed at and directly resulting in the censorship and suppression of theatrical productions performed on a stage in a public place. It cannot be overemphasized that the ordinance clearly proscribes in all designated places the appearance of any person with breasts, pubic hairs or genitals uncovered even if such appearance be part of a presumptively protected artistic expression.

This ordinance is not limited to exposure of private parts in a street or park. It is not even limited to outlawing topless dancing. It relates to a ballet, dance, pantomime, modern rock political satire, striptease with a storyline, dramatic show, and musical comedy. The ordinance covers almost every conceivable place in the Town in which such a performance could be given. It is all-encompassing, making no distinction between topless waitresses, improperly dressed patrons, and artistic performers. It makes no distinction between obscene and non-obscene performances. It is, indeed, the broadest across-the-board prohibition imaginable and is, therefore fatally overbroad as such term has been defined in innumerable decisions of this court.

As was said in NAACP v. Button, 371 U.S. 415, 432-433

> "The objectionable quality of vagueness and over-breadth does not depend on absence of fair notice to a criminally accused ... but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a Penal Statute susceptible of sweeping an improper application."

It is the susceptibility of the sweeping and improper application of the ordinance which requires its invalidation.[8]

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[8] The ordinance is constitutionally overbroad since "It sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." Thornhill v. Alabama, 310 U.S. 88, 97.

This overbreadth chills the exercise of First Amendment rights by deterring performers, including but not limited to dancers, from appearing bare breasted in all or a segment of their artistic performance. To require the Ballet Afrikans which performs bare breasted in their native land and in their exhibitions and performances throughout the world to don brassieres in the course of performance in the Town of North Hempstead, as required by the ordinance, would serve no legitimate purpose other than the corruption of their performance. To require the actors and actresses in "Hair", when performing in the Town of North Hempstead, to cover their breasts and lower part of their torsos would censor their performance and detract from its impact and artistic purpose. Examples too numerous to mention, including occasional baring of breasts in dramatic plays presently on and off Broadway, can be cited.

It would be no answer to this claim of overbreadth to say that the Ordinance would not be applied to such cases but only to appellants' performers. Keyishian v. Board of Regents, supra, at 599. It is the susceptibility of the sweeping and improper application of the ordinance to expressive matter presumptively protected by the First Amendment which requires the Ordinance's invalidation.

Lewis v. City of New Orleans, 415 U.S. 130 (1974); Keyishian v. Board of Regents, supra, at 599; NAACP v. Button, 371 U.S. 415, 442-433; Smith v. California, supra, at 151 .

This is not a case such as Broadrick v. Oklahoma, 413 U.S. 601, at 618, where the Ordinance had a few possible impermissible applications. It is an across the board prohibition against the baring of breasts in most public places as part of any endeavor, artistic or otherwise. It is facially overbroad.

The Ordinance Censors Protected Expression, Not Conduct

The essence of appellants' arguments under Point I amounts to an assertion that the prohibition of the Ordinance is allegedly "directed to conduct." Since according to appellants', conduct is allegedly proscribed by the Ordinance, the Town may regulate such conduct under the police power in the same way that it regulates litter, noise, ... congestion, . .. garbage removal, repair of street and roads, and the enforcement of its zoning law. Appellants are in error.

It should first be noted that this case does not involve zoning regulation. Hence Boraas v. Village of Belle Terre, 416 U.S. 1 (1973), and Euclid v. Ambler Realty, 272 U.S. 365 (1926) cited by appellants do not apply. This case does not involve prohibition of the burning of

Selective Service Registration Certificates or the burning or multilation of any property for that matter. Hence United States v. O'Brien, 391 U.S. 367 (1968), does not apply. This case does not involve the regulation of the service or sale of liquor by the drink or otherwise.[9] Hence California v. LaRue, 409 U.S. 109 (1972), with its Twenty-First Amendment implications, does not apply. This case does not involve the mere prohibition of bare breasted waitresses and other employees of drinking establishments who mingle with the patrons, auction off their undergarments, touch and are touched by the patrons, and perform no artistic exhibition. Hence State cases regulating such conduct do not apply.[10]

What this case concerns is an ordinance which sets forth an across the board prohibition upon any breast, pubic hair or genital exposure in various designated and public places, including but not limited to censorship and prior restraint of the content and exhibition of theatrical performances. Since a theatrical production, like

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[9] Included in premises covered by the Ordinance are places which do not sell alcoholic beverages and places which sell neither food nor drink.

[10] In this case, unlike Brandon Shores, Inc. v. Greenwood Lake, 68 Misc. 2d 343, 32 N.Y.S. 2d 957, the First Amendment issue has been raised. Thus Brandon Shores certainly does not apply.

a motion picture, is protected by the First Amendment, Southeastern Promotions v. Conrad, supra; Schacht v. United States, supra; California v. LaRue, supra, it would seem obvious from a point of view of First Amendment analysis that a dance exhibition in public on a stage is undistinguishable from any other type of theatrical production. Can a distinction be drawn between dance routines based upon the locality of the stage on which each is performed?"[11] Can a distinction be drawn between dance routines based upon whether they are part of a Broadway musical, a rock concert, a ballet, or a one person recital? Can a distinction be drawn between a modern dance recital, a dramatic play, a lavish musical a go-go dance exhibition, a belly dance exhibition, or any other type of theatrical production performed on a stage? If no such distinctions may be drawn among each of the various classes of theatrical productions heretofore referred to, are they not all presumptively protected by the First Amendment and protected from overbroad legislative interference with their content. See footnote 3 of majority opinion in Salem Inn v. Frank, 501

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[11] "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163; Quoted with approval in Southeastern Promotions Ltd. v. Conrad, supra 4368.

F. 2d 18.

Recently, the Supreme Court has had occasion to review the issue of First Amendment protection of theatrical performances and local government attempts to restrain them.

In Southeastern Promotions Ltd. v. Conrad, supra, a municipality refused to permit the use of its public assembly facility for exhibition of a show which provided nude performances. This refusal was held by both the District Court and the Circuit Court to involve a constitutionally permissible limitation upon conduct, not speech. In the words of the Supreme Court, at 4367,

> "The District Court ... concluded that group nudity and simulated sex would violate city ordinances and state statutes making public nudity and obscene acts criminal offenses. This criminal conduct, the Court reasoned, was neither speech nor symbolic speech, and was to be viewed separately from the musical's speech elements. Being pure conduct, comparable to rape or murder, it was not entitled to First Amendment protection ... on appeal, the United States Court of Appeals for the Sixth Circuit, by a divided vote affirmed ... the majority relied primarily on the lower court's reasoning. Neither the Judges of the Court of Appeals nor the District Court saw the musical performed."

Thus, in March of 1975 it reversed, holding at Page 4367:

> "We hold that respondents' rejection of petitioner's application to use this public forum accomplished a prior restraint under a system lacking in constitutionally required minimum procedural safeguards."

The basis for this holding was the following reasoning (p. 4369).

> "Only if we were to conclude that live drama was unprotected by the First Amendment or subject to a totally different standard than that applied to other forms of expression could we possibly find no prior restraint here. Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems (citations omitted). By its nature, theatre usually is the acting out or singing out of the written word, and frequently mixes speech with live action or conduct. But that is no reason to hold theatre subject to a drastically different standard."

By so reasoning and holding, the Court recognized that a theatrical performance is an inseparable entity, a union of words, action, music, emotion, or any combination of the foregoing. " The nonverbal elements in a theatrical production are the very ones which distinguish this form of art from literature." Southeastern Promotions Ltd. v. Atlanta, 334 F. Supp. 634, 639 (N.D. Ga. 1971).[12] This is equally true of each type of theatrical performance, every one of which is subject to the nudity ban of the Ordinance herein.

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[12] It is not, therefore, "separately identifiable conduct which allegedly was intended by (petitioner) to be perceived by others as expressive or particular views but which on its face, does not necessarily convey any message." Cohen v. California, 403 U.S. 15, 18.

As Mr. Justice Blackmun noted in Southeastern Promotions v. Conrad, supra, each art form presents its own unique set of First and Fourteenth Amendment problems. Each must be judged for what it is, not by standards applicable to another medium of expression. There is no aspect of speech (with the possible exception of the written word) which does not involve an integrally related action that is part and parcel of that speech.[13] Thus in Kleindienst v. Mandel, 408 U.S. 753, 764, the speech-conduct argument was expressly rejected by the Supreme Court which stated:

> "We cannot realistically say that the problem facing us disappears entirely or is non-existent because the mode or regulation bears directly on physical movement."

The integrated activities protected by the First Amendment, too numerous to tabulate, including writing, publishing, dancing, singing, acting, picketing, leafleting, demonstrating, broadcasting, etc., are all speech, and are curtailable in whole or in part only by narrowly drawn restrictive legislation designed and necessary to vindicate

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[13] See Tinker v. Des Moines School District, 393 U.S. 503; Organization for a Better Austin v. Keefe, 402 U.S. 415, 419; Spence v. Washington, 417 U.S.; Southeastern Promotions Ltd. v. Conrad, supra.

compelling governmental interests. U.S. v. O'Brien, 391 U.S. 367, 376. Moreover, when such restrictive regulation involves sexual content, it must satisfy obscenity criteria.[14] Miller v. California, 413 U.S. 15, 25-6.

If, as the Supreme Court has recently held in Southeastern Promotions Ltd. v. Conrad, supra, theatrical performances including bare breasted females are just as much presumptively protected by the First Amendment as motion picture and cannot therefore be subjected to prior restraint, can the content of such theatrical productions be restricted by an across the board prohibition against the baring of a breast? Is there any doubt that the Town of North Hempstead would have no power to forbid the exposure of a naked breast in a motion picture in any of the designated places within the Township. How then can appellants argue that this is permissible in the case of theatrical productions? If the Town of North Hempstead cannot summarily deny a license for the exhibition of the show "Hair" in its municipal auditorium, how can it proscribe its exhibition in any place in the Town?

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[14] Obscenity is not in issue herein. Further, appellants do not allege that appellee's theatrical presentations are obscene.

Appellants formulate their speech conduct dichotomy as follows: because topless dancing is conduct with little, if any, expressive elements, it is not afforded absolute First Amendment protection and the Town may properly exclude this form of entertainment under its police power. Firstly, it cannot be overemphasized that the ordinance is directed at bare breasts in any form of artistic endeavor. It is not limited to topless dancing. It is not limited to conduct with little, if any, expensive element. It covers any bare bosom in any theatrical performance in the designated places, whether that theatrical performance be a dramatic presentation of the biblical story of Adam and Eve, the musicals "Hair" or "Calcutta", the musical revue of the Follies Bergere, or the Ballet Africans.

Secondly, as was noted heretofore and in Southeastern Promotions Ltd. v. Conrad, supra, a theatrical production, like a motion picture, is not conduct within the meaning of Broadrick and O'Brien, but protected expression.[15]

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[15] Sheldon v. Metro-Goldwyn, 81 F. 2d 49 (2d Cir. Judge Learned Hand): "Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves ... a nod, a movement of the hand, a pause may tell the audience more than words could tell ... the play is the sequence of the confluents of all these means bound together in an inseparable unity . . ."

In neither of the foregoing cases was there any theatrical production or artistic endeavor. Even in those cases however, it was clearly held that only a compelling governmental interest in regulating the nonspeech element can justify incidental limitations on the protected expression.

Thirdly, in O'Brien it was clearly held that the governmental interest to be protected must be unrelated to the suppression of free expression, and the incidental restriction of the First Amendment freedom must be no greater than is essential to the furtherance of that interest. U.S. v. O'Brien, 391 U.S. 367, at 376-377 (1968). Thus even if this were a case of mixed conduct and speech (which it is not) this blunderbuss ordinance cannot be justified on any grounds other than speech inhibition, and if founded on the grounds urged by appellants, is far greater in sweep than essential to the furtherance of the legitimate governmental interest sought to be achieved thereby.

Fourthly, the ordinance regulates a speech element of a theatrical performance, rather than a nonspeech element, since the nudity is an integral element of the artistic performance, the totality of which is inseparable protected speech (unless obscene).

APPELLEES MAY PROPERLY RAISE THE OVERBREADTH ISSUE

Appellants question the right of appellees to assert the overbreadth of the ordinance where it is abundantly clear that their activities could or would fall within the proscription of a more narrowly drawn law.[16]

Initially, it should be noted that when local laws which limit First Amendment freedoms are challenged in a Federal Court on grounds of overbreadth, they must be judged on their face. Aptheker v. Secretary of State, 378 U.S. 500; Zwickler v. Koota, 389 U.S. 241. It is not the function of the Federal Court to predict or foresee a limiting construction of the words of the ordinance. Secondly, the Federal Court cannot dissect the overbroad ordinance, invalidating some and saving the rest. As was said in Smith v. California, supra, at 151:

> "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights

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[16] This argument might be more aptly addressed to standing.

> of free expression with the expense and inconvenience of criminal prosecution."

Thirdly, the fact that appellees are aware that the Ordinance is directed at them does not eliminate the constitutional deficiencey of vagueness and overbreadth in the First Amendment sense. As was said in NAACP v. Button, 371 U.S. 415, at 432-433,

> "The objectionable quality of vagueness and overbreadth does not depend on absence of fair notice to a criminally accused . . . but upon the danger of tolerating in the area of First Amendment freedoms, the existence of a Penal Statute susceptible of sweeping and improper application."

Thus, a person may know that he is or may be caught within the net of an overbroad speech inhibiting statute and thereby be chilled in the exercise of his First Amendment rights.[17]

Fourthly, appellees herein have every right to assert the overbreadth of the Ordinance herein even if it

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[17] Appellants' contention that the chill results from lack of notice of the scope of regulation is wholly incorrect. the reference by appellants to Younger v. Harris is more properly covered under an issue of abstention. At this time, however, it should be noted that Younger did not hold as appellants contend, that the plaintiffs' activity must be shown to be protected activity without any possibility of regulation by a narrowly drawn law.

be conceded, which it is not, that their activities could be properly proscribed by a narrowly drawn ordinance. In Tollett v. United States, 485 F. 2d 1087 1088-9 (1973), the United States Court of Appeals for the Eighth Circuit treated these issues, reviewing the precedents in some detail. It concluded as follows:

> "It is now settled that a person has standing to attack a statute as overly broad if a reasonable construction of the act allows suppression of free speech notwithstanding that the person's own conduct might not be constitutionally protected. This rule is recognized because of the 'danger of tolerating, in the area of First Amendment freedoms, the existence of a Penal Statute susceptible of sweeping and improper application.' Dombrowski v. Pfister, 380 U.S. 479,487,85 S. Ct. 1116, 1121, 14 L. Ed. 2d 22 (1965), quoting NAACP v. Button,371, U.S. 415, 433, 83 S. Ct. 328, 9L.Ed. 2d 405 (1963). Without proper restriction such a law 'would tend to suppress constitutionally protected rights.' Note, the First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 873 (1970). To allow standing under such circumstances' is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.' Gooding v. Wilson, 405 U.S. 518, 521, 92 S. Ct. 1103, 1105, 31 L. Ed. 2d 408 (1972). Since this is a departure from traditional rules of standing the doctrine requires that the overbreadth

> of a statute 'must not only be real, but substantial as well.' Broadrick v. Oklahoma, U.S. 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)."

Virtually all of the arguments of appellants on this point were disposed of by the Supreme Court in Gooding v. Wilson, 405 U.S. 518, at 520, 521 (1972), when this Court held:

> "Only the Georgia Courts can supply the requisite construction, since of course 'we lack jurisdiction authoritatively to construe State legislation.' United States v. 37 Photographs, 402 U.S. 363, 369, 28 L. Ed. 822, 830, 91 S. Ct. 1400 (1971). It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution,' Dombrowski v. Pfister, 380 U.S. 479, 491, 14 L. Ed. 2d 22, 31, 85 S. Ct. 1116 (1965), the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity,' (Citations omitted). This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

> 'Although a statute may be neither vague, overbroad, or otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute, The statute, in effect is striken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights.' Coates v. City of Cincinnati, supra, at 619-620, 29 L. Ed. 2d 221 (opinion of White, J.).' (Citation omitted)."

It cannot be doubted that the ordinance is overbroad, is speech inhibiting, is directed against a class of which appellees are members, and is subject to attack on this basis by appellees as violative of their First and Fourteenth Amendment rights.

POINT II

THE ORDINANCE ESTABLISHES AN UNCONSTITUTIONAL LOCATION CLASSIFICATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE

The Supreme Court has clearly held:

> "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in

some other place."[18]

In any event it should be noted that the arbitrary and capricious location classification established by the Ordinance subjects it to attack on equal protection grounds. In view of the clear meaning of the ordinance, little need be said about this point, other than to call to the Court's attention the fact that Judge Bartels, in striking down the Ordinance, declared it violative of the equal protection provisions of the Fourteenth Amendment in language and with reasoning that hardly requires amplification.

> "Since the location classification here involves the exercise of fundamental rights protected by the First Amendment, the classification must again serve a 'compelling State interest' to withstand such an attack. Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Skinner v. Oklahoma, 316 U.S. 535 (1942); O'Neill v. Dent, supra. While restrictions applied only to places serving alcoholic beverages have been upheld in certain circumstances involving the Twenty-First Amendment, California v. La Rue, supra: Paladino v. City of Omaha, 471 F. 2d 812 (Eighth Circuit 1972);

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[18] Schneider v. State, 308 U.S. 147, 163; Quoted with approval in Southeastern Promotions Ltd. v. Conrad, supra, 4368

> Salem v. Liquor Control Commission, 298 N.E. 2d 138, 34 Ohio St. 2d 244 (1973), the ordinance here applies its restrictions to coffee shop, restaurants and even dance halls and discotheques. It is difficult to determine what compelling State interest would be served by an ordinance which would bar a production of "Hair" at a cabaret and allow nude dancing in a burlesque theatre." (underlining supplied)

It should be noted that even in the liquor cases, the prohibition related to the sale of liquor and did not proscribe the expressive activity. See: Salem Inn v. Frank, 501 F. 2d 18.

POINT III

APPELLANTS' POSITION IS ERRONEOUS

In the very first sentence of Point I, appellants assert that "the doctrine of overbreadth is a narrow and judicially limited doctrine, to be exercised only as an exception to the usual procedure in reviewing the constitutionality of statutes." They fail, however, to recognize the fact that the ordinance was enacted and effects just that area in which this exceptional doctrine was meant to operate, the area of speech inhibiting legisaltion. Appellants' attempt to limit that doctrine to the area of "spoken words" cannot be supported by any authority and, in fact, flies in the face of all well established principles of First Amendment law. See cases cited in footnote 13.

In the second complete paragraph Page 3 of their brief, appellants evince a complete misunderstanding of plaintiffs' position herein by stating

> "The plaintiffs' claim of facial overbreadth, was an assertion that the law 'as applied,' created a chill of the plaintiffs' rights of expression ..."

A cursory reading of the complaint herein will reveal that plaintiffs have attacked the ordinance both facially and as applied.

Appellants then go on to state that topless dancing "has never been afforded absolute protection of the First Amendment." No expressive matter is absolutely protected by the First Amendment. All expressive matter is presumed to be protected. Even pure speech such as a shout of "fire" in a crowded theatre may not be protected by the First Amendment. Certainly obscene topless dancing would not be protected by the First Amendment. Nevertheless, just as the spoken word is presumed to be protected, so topless dancing is presumed to be protected.

Later on Page 3 appellants contend that plaintiffs "must show some effect of the chapter on their constitutional rights." While this effect cannot be denied in the instant

case, it is clearly not required to be shown by the plaintiff. See quotation from Gooding v. Wilson, supra, pages 25 and 26 of this brief.

Appellants then go on to argue that the ordinance regulated conduct, not speech. Since speech is not regulated, the doctrine of overbreadth does not apply. This has been discussed in Point I of this brief.

On Page 6 of their brief appellants return to the argument that plaintiffs may not assert the overbreadth of the ordinance as to others but must assert their own rights. They erroneously cite Broadrick v. Oaklahoma, 413 U.S. 601 in support of this proposition. They then cite Dombrowski and Younger for the proposition that it is the duty of appellants to establish that in order to invoke the doctrine of overbreadth, appellees must establish that their own conduct could not be regulated by a narrowly construed statute. This again flies in the face of all determinations of this Court, many of which were summarized in Gooding. Neither Broadrick nor Younger hold otherwise. In any event, the limiting construction argument is merely one facet of an abstention argument which has not even been raised by appellants in this appeal. It has

been held that abstention is inappropriate except where a limiting validating construction could be placed upon the statute by the State Courts in a single case. Dombrowski v. Pfister, supra, 491; Gooding v. Wilson, supra 520-1. The ordinance must be uncertain in nature, and "obviously susceptible of a limiting construction" in order to warrant abstention. Zwickler v. Koota, supra, at 251, note 14. As Judge Oakes noted in the first Salem Inn case, Salem Inn v. Frank, 501 Fed. 2d 18,

> "In other words, we are asked to abstain on the shear speculation that State Courts might interpret Local Law No. 1-1973 contrary to its explicit language, thereby removing the constitutional question. Such speculation does not satisfy the 'special circumstances' required to make abstention proper. See: Zwickler v. Koota, 389 U.S. 241, 249-52, 254 (1967): Baggett v. Bullitt, 377 U.S. 360, 375-78 (1964)."

The overbreadth of the instant ordinance is such that it would take innumerable cases and a like number of years to limit the statute to a point where the substantive issue of constitutionality would pose a credible problem. In fact, far from being obviously susceptible of a limiting construction, it is unlikely that any construction could

save this overbroad speech inhibiting statute. The only purpose for abstention in the instant case would be to permit the State to put appellants out of business through the suppression of their First and Fourteenth Amendment rights prior to the expiration of the many years that it would take to adjudicate the issues raised herein through the multitiered state criminal process. As was said in Hart and Wechsler, the Federal Court and the Federal system, (2 ed.) 367,

> "Where First Amendment rights are involved-questions relating to the structure and timing of (judicial) remedies have been thought crucial to substantive constitutional policies."

In any event, neither the issues of abstention nor standing have been urged on this appeal except tangentially under a substantive argument urging the ordinance's lack of overbreadth.

On Page 8 appellants argue that this is a case of the "right thing in wrong place." This means that it is the position of appellants that the ordinance properly expresses the intent of the Town of North Hempstead to forbid nudity in cabarets, bars, lounges, discotheques, dance halls, restaurants and coffee shops while permitting it in opera houses, theatres, playhouses and applicable:

> "It is difficult to determine what compelling State interest would be served by an ordinance which would bar a production of "Hair" at a cabaret and allow nude dancing in a burlesque theatre."

Later, on Page 8, appellants argue that, "the examination should be confined to the statute itself, the conduct prohibited and application to plaintiffs and not to some speculative application and not to some possible prohibition of action which plaintiffs suggest other persons may undertake." They cite Broadrick. This argument manifests a complete misconception of the doctrine of overbreadth. To say more would belabor the point.

On Page 9, appellants argue the presumptive validity of legislative acts. Again they ignore the entirely different presumption applicable to speech inhibiting legislation, that any system of prior restraints of expression bears a heavy presumption against its constitutional validity, and government carries a heavy burden of showing justification for the imposition of such a restraint. New York Times Co. v. U.S., 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

At the end of Page 9 and beginning of Page 10, appellants urge the argument that the method used by the legislature in effecting its ends should be left entirely to the legislature. While it is true that where economic interests alone are involved, a legislature is given more latitude in the selection of the means by which it attempts to foster its legitimate ends, in areas which impinge upon the exercise of fundamental liberties such as freedom of speech and press, the means adopted are crucial. As a result, an entire body of law has arisen to protect against prior restraints and censorship. No citation is required for the proposition that speech inhibiting legislation must be narrowly drawn and must be ringed about with substantial procedural safeguards before it can ever be justified, even by a compelling governmental interest.

It would be consistent with appellants' position for the Town of North Hempstead to adopt a law against movement of lips in various designated places. Such legislation would be equally justifiable to the Ordinance herein under the same logic expressed by appellants in Point I of their brief.

In Point II of appellants' brief, they erroneously assert that the sweep of the ordinance is limited to places where food and drink are sold. Even if this were true, which it is not (see definition of discotheques and dance halls which includes premises "whether or not food or alcoholic beverages are served to be consumed upon the premises,"), how would this defeat the equal protection argument against the ordinance? There is no argument that the exposure of a naked breast by a performer on a stage will somehow contaminate the food and drink consumed by the patrons. Where is the interest of the Town of North Hempstead in forbidding a patron of a show from being served a sandwich and drinking a cup of coffee while viewing the entertainment? Would it not have made just as much sense to forbid the nudity in places where food and drink are not served?

On Page 13 of their brief, appellants argue that the prohibition against breast exposure "was drafted to exclude those places most likely to have artistic productions and to include those least likely to have such artistic productions." It is difficult to see how the problems o

litter, noise, traffic congestion, and proximity to schools is in any way fostered by the foregoing argument. Does the artistry of the production or the place where it is exhibited in any way relate to the alleged evils sought to be abated by the ordinance? The foregoing clearly pinpoints the hypocrisy of appellants' position and establishes that the ordinance was not meant to foster its purported ends, but rather to enact a descriminatory moralistic censorship upon entertainment in designated places within the Town. Appellants show their true colors on Page 13 of their brief by admitting that the purpose of the ordinance is not directed against the alleged evils of litter, noise, congestion but rather with "the intent of the legislature to ban commercial exploitation (of) nudity." How this commercial exploitation of nudity may be banned in certain places and not in others within the Town without violating the equal protection clause of the Fourteenth Amendment is not discussed by appellants. Every public exhibition given by professional performers involves a commercial exploitation whether that exhibition be of a ballet, musical comedy, dance exhibition, rock concert, or Shakespearean play. If

the performance contains nudity, it becomes, according to appellant, a commercial exploitation of nudity subject to proscription if performed in certain designated places but permissible if performed in excluded places. This is the essence of arbitrary classification. Either the commercial exploitation of nudity is an evil which may be suppressed by the Township in all places or a legitimate theatrical performance presumptively protected by the First Amendment and immune from suppression in any places. It should be noted that the commercial exploitation of nudity is much clearer in places which charge admission and offer nothing more than the performance than it is in places which charge no admission and earn their income through the sale of food and drink.

Throughout their brief, appellants refer to a "quantum of expression" test. It is respectfully submitted that this is a misnomer. What appellants are driving at is a qualitative rather than a quantitative evaluation of the expression. Neither is appropriate. Appellants' reliance upon Broadrick and O'Brien is inappropriate.

In the foregoing analysis of appellants' arguments,

no attempt has been made to restate the law cited in Points I and II of this brief. It is respectfully submitted that the decision below is firmly grounded in prior decisions of the Supreme Court of the United States and of this Court. The instant appeal can be justified only upon the grounds that appellants misapprehend those decisions or believe that through multiple enactment of unconstitutional ordinances they may drive appellees out of business as a result of economic duress occasioned by the non ending litigation. It should be noted that the instant Ordinance was enacted before the ink was dry on the Court of Appeals decision striking down its predecessor. It is respectfully submitted that the instant Ordinance, with its arbitrary place classification, is even greater constitutional abomination than its predecessor and should suffer the same fate.

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

KASSNER & DETSKY, P.C.
Attorneys for Appellees
122 East 42nd Street
New York, New York 10017
(212) 661-8190

Of Counsel,

Herbert S. Kassner

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SALEM INN, INC. and M & L REST, INC.,

Plaintiffs-Appellees,

against

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of theTown of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella , being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 East 17th Street, Brooklyn, New York, 11230
That on April 14, 1975 , she served 2 copies of Brief for Appellees

on

Francis F. Doran, Esq.,
Individually and as Town Attorney
of the Town of North Hempstead,
Attorney pro se
220 Plandome Road,
Manhasset, New York 11030

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

.....Rose Rinella.....

Sworn to before me this
14th day of April , 1975

John V. Esposito

JOHN V. ESPOSITO
Notary Public, State of New York
No. 30-[illegible]
Qualified in Nassau County
Commission Expires March 30, 1977